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In the Supreme Court of the United States

OCTOBER TERM, 1978

BOBBY EUGENE GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1979. A petition for rehearing was denied on April 3, 1979 (Pet. App. 28). The petition for a writ of certiorari was filed on May 1,

1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, a convicted felon who possessed firearms, was exempt from prosecution under 18 U.S.C. App. 1202(a) because he received a pardon for the predicate felony after his arrest on the firearms charges.

2. Whether 18 U.S.C. App. 1202(a), as applied to petitioner, is an ex post facto law or one that subjects him to double jeopardy.

3. Whether an indictment charging that petitioner, while a convicted felon, possessed firearms "which had moved in interstate commerce" states an offense under 18 U.S.C. App. 1202(a).

4. Whether the procedure followed by the district court at sentencing denied petitioner the right of allocution guaranteed by Fed. R. Crim. P. 32(a).

5. Whether the district court's incomplete paraphrase of the indictment at the beginning of trial was reversible error where the jury instructions given at the close of the trial were proper.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner, a convicted felon, was convicted on two counts of unlawfully possessing firearms, in violation of 18 U.S.C. App. 1202(1). He was sentenced to

concurrent terms of imprisonment for one year and one day, subject to the immediate parole eligibility provisions of 18 U.S.C. 4205(b)(2). The court of appeals affirmed (Pet. App. 27).

The facts are not in dispute. Petitioner was convicted on February 11, 1964, in McCracken County Circuit Court, Paducah, Kentucky, of receiving stolen property, and he served 27 months of a three-year sentence (Tr. 25-26, 104). In the year following petitioner's release from prison, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (hereafter "the Omnibus Act"), which made it a federal crime for a convicted felon knowingly to possess a firearm [1] but exempted those felons who had received pardons that specifically authorized them to carry firearms.[2]

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[1] 18 U.S.C. App. 1202(a)(1) provides:

> (a) Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony,
>
> * * * * *
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[2] 18 U.S.C. App. 1203 provides in pertinent part:

> This title shall not apply to—
>
> * * * * *
>
> (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President

On September 2, 1977, two uniformed police officers entered petitioner's home with his consent and observed a gun cabinet containing firearms, all of which were in plain view (Tr. 42-49). The officers notified the Bureau of Alcohol, Tobacco, and Firearms, and the following day two ATF agents went to petitioner's residence, saw the guns, and placed him under arrest (Tr. 57-62). Petitioner admitted that all but two of the ten guns found in his home at the time of his arrest belonged to him (Tr. 63-64, 68). At trial he admitted that four of the guns were his (Tr. 114), asserting that the others belonged to members of his family. Petitioner's defense was that he used the guns only for hunting or other recreational purposes.

After his arrest for violating 18 U.S.C. App. 1202, petitioner applied for a pardon for the underlying state felony (Tr. 104-105). On November 29, 1977, the Governor of Kentucky granted him a partial pardon, restoring his citizenship rights but not containing any express authorization for petitioner to receive, transport, or possess firearms (A. 26-27).[3]

On March 4, 1978, petitioner was indicted by a federal grand jury on two counts of possession and one count of receiving stolen firearms. He was convicted on the possession counts.

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or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

[3] "A." refers to petitioner's appendix in the court of appeals.

ARGUMENT

1. Petitioner contends (Pet. 18-21) that the indictment charging him with federal firearms violations, predicated on his 1964 state felony conviction, should have been dismissed because he received a state pardon for the predicate offense after he was arrested for unlawful possession of the firearms. This contention has no support in law or logic. At the time he possessed the firearms in question, petitioner was an unpardoned convicted felon. He was therefore within the express terms of 18 U.S.C. App. 1202(a), was entitled to no exemption under 18 U.S.C. App. 1203, and was lawfully prosecuted for the offense regardless of subsequent events. See *United States* v. *Herrell*, 588 F.2d 711, 712-713 (9th Cir. 1978); *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978); *United States* v. *Williams*, 484 F.2d 428, 430 (8th Cir. 1973).[4] We do not concede that the pardon petitioner later received would have allowed him to possess the firearms even if he

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[4] Petitioner makes no claim that the underlying conviction was unconstitutional, so this case does not raise the question presented in *Lewis* v. *United States*, cert. granted, No. 78-1595 (June 18, 1979). The circumstances here are also unlike those in *United States* v. *Fryer*, 545 F.2d 11, 14 (6th Cir. 1976), in which the court held that "a conviction *already set aside* under the Youth Corrections Act cannot constitute a conviction for the purpose of 18 U.S.C. App. § 1202(a) * * *" (emphasis supplied). (In *Fryer* the conviction had been vacated in 1973, although, owing to a clerical error, an official record had not been made at that time to show the judgment vacated. The firearms purchase with which the defendant was charged occurred in 1974.)

had received it before he undertook to possess them.[5] But the Court need not reach that question here, since petitioner unquestionably possessed the firearms before he received the pardon.

2. Petitioner also contends (Pet. 16-17) that 18 U.S.C. App. 1202(a) is an ex post facto law as applied to him, because he was convicted of the state felony before the federal law was enacted. In a related contention, he asserts that Section 1202(a) subjects him to double jeopardy because it punishes him a second time for the state felony. These arguments take no account of the fact that it was possessing firearms as a convicted felon, not simply being a convicted felon, that subjected petitioner to prosecution under Section 1202(a) and that he could have avoided prosecution by not undertaking to possess firearms. Petitioner cites no authority in support of his contentions, and similar arguments have been rejected by every circuit that has considered them. See, *e.g.*, *United States* v. *Sutton*, 521 F.2d 1385, 1390-1391 (7th Cir. 1975); *United States* v. *McCreary*, 455 F.2d 647, 648 (6th Cir. 1972); *United States* v. *Karnes*, 437 F.2d 284, 289-290 (9th Cir.), cert. denied, 402 U.S. 1008 (1971); *United States* v. *Phillips*, 432 F.2d 973, 975 (8th Cir. 1970). See also *Scarborough* v. *United States*, 431 U.S. 563 (1977); *Carlesi* v. *New York*, 233 U.S. 51 (1914); *Hawker* v. *New York*, 170 U.S. 189 (1898).

3. Petitioner argues (Pet. 10-15) that the indictment failed to allege a criminal offense because it charged him with possession of weapons "which had moved in interstate commerce" instead of merely tracking the statutory language by alleging that he possessed the firearms "in commerce and affecting commerce." An indictment will not be found defective for failure to use language identical to that of the statute in question, so long as it can reasonably be read to state the elements of the offense charged. See, *e.g.*, *United States* v. *Camp*, 541 F.2d 737, 739-740 (8th Cir. 1976); *United States* v. *Willis*, 515 F.2d 798, 799 (7th Cir. 1975); *Humphries* v. *Green*, 397 F.2d 67, 69 (6th Cir. 1968). See also *Hagner* v. *United States*, 285 U.S. 427, 431 (1932). Petitioner's contention that the language used in his indictment did not adequately state the commerce element of the offense is disposed of by this Court's decision in *Scarborough* v. *United States*, *supra*, 431

[5] Under 18 U.S.C. App. 1203, only a pardon that "expressly" authorizes its recipient to receive, possess, or transport firearms will exempt him from prosecution under 18 U.S.C. App. 1202. Petitioner's pardon does not refer expressly to rights with respect to firearms but merely restores "all rights of citizenship." This does not meet the requirements of Section 1203. *United States* v. *Sutton*, 521 F.2d 1385, 1389 (7th Cir. 1975). See also *United States* v. *Kelly*, 519 F.2d 794 (8th Cir.), cert. denied, 423 U.S. 926 (1975). In *United States* v. *Matassini*, 565 F.2d 1297 (5th Cir. 1978), the Fifth Circuit held that a Florida pardon granted in 1955 without an express reference to rights with respect to firearms was nevertheless sufficient to bring the recipient of the pardon within the Section 1203 exemption; but the court distinguished the case from those, like the present case, that involved pardons granted after passage of the Omnibus Act, when governors would be on notice of the language required in a pardon to restore the recipient's right to possess firearms. *Id.* at 1305 n.14.

U.S. at 575, holding that the term "affecting commerce" in 18 U.S.C. App. 1202 signifies nothing more than "the minimal nexus that the firearm have been, at some time, in interstate commerce." An indictment alleging that the defendant possessed firearms that had "moved in interstate commerce" thus states an offense under Section 1202(a).

4. Petitioner contends (Pet. 23-24) that he was denied the right of allocution guaranteed by Fed. R. Crim. P. 32(a) when the trial judge imposed sentence without having specifically asked petitioner if he wished to supplement his counsel's statement in mitigation of punishment.

This question was not properly raised below, however, and there is no reason for this Court to depart from its usual practice of declining to consider issues presented here for the first time. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).[6] This is not a case in which "the defendant was affirmatively denied an opportunity to speak during the

[6] The issue was not raised in petitioner's brief, his reply brief, or his timely petition for rehearing in the court of appeals. Although it was referred to briefly in a "Supplemental Petition for Rehearing" filed more than two weeks after the court of appeals' judgment, petitioner never sought an extension of time to permit the filing of this supplemental petition outside of the time allowed by Fed. R. App. P. 40(a). Moreover, the court of appeals' order denying rehearing, which states that "the issues raised herein were adequately considered and finally resolved when this matter first came on for a hearing" (Pet. App. 28), indicates that the court did not consider petitioner's belated claim. Hence, this issue was never properly presented to the court of appeals.

hearing at which his sentence was imposed" nor one in which it is suggested that the sentencing judge was "misinformed or uninformed as to any relevant circumstances" (*Hill* v. *United States*, 368 U.S. 424, 429 (1962)). Thus, although the district court may have erred in failing to comply strictly with Rule 32(a),[7] the error is not of sufficient magnitude to warrant this Court's review, especially since it was not properly raised in the court of appeals. Cf. *Hill* v. *United States*, *supra* (similar Rule 32(a) violation held not subject to collateral attack in the absence of a showing of prejudice).

Petitioner does not identify what information he would have brought to the district court's attention that his counsel failed to include in his presentation at sentencing, nor does petitioner otherwise allege prejudice.[8] Indeed, after hearing the remarks of defense counsel, the trial judge indicated that he was

[7] See *Green* v. *United States*, 365 U.S. 301 (1961); *United States* v. *Murphy*, 530 F.2d 1 (4th Cir. 1976); *United States* v. *Van Drunen*, 501 F.2d 1393, 1399 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). But cf. *United States* v. *Cardall*, 550 F. 604, 607 (10th Cir. 1976); *United States* v. *Scallion*, 533 F.2d 903, 920 n.20 (5th Cir. 1976), cert. denicd, 429 U.S. 1079 (1977).

[8] Petitioner filed the equivalent of a motion for reduction of sentence under Fed. R. Crim. P. 35 shortly after sentencing (Pet. App. 35), stating that he had "some things" he had "wanted to say" but not indicating what they were. He sought a hearing on his motion and replacement of the sentence of imprisonment by a fine (*ibid.*). The district court denied the motion (Pet. App. 36). Petitioner is free, however, to renew his motion and state specifically what facts he wishes to bring to the district court's attention.

extremely sympathetic to the mitigating circumstances in petitioner's case (Pet. App. 31), a viewpoint apparently reflected in the sentence. Under these circumstances, there is no reason to remand this case for resentencing.

5. Finally, petitioner contends (Pet. 21-22) that the district court improperly omitted a phrase from the indictment when paraphrasing portions of it for the jury at the start of the trial. Petitioner cites no authority for the proposition that this is reversible error even if the judge correctly instructs the jury, at the close of the case, on the elements of the offenses charged. Petitioner does not claim that the instructions given in this case were in any way inaccurate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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